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CURRENT TOPICS.

The Supreme Court of Illinois, in the case of People v. Wabash, etc. R. Co., decided a constitutional question of a character which is likely to be of frequent occurrence in other States as well. The question was as to the validity of a statute of the State prohibiting unjust discriminations by a railroad company in the rates charged for the transportation of passengers and freights, as applied to traffic between a point within, and a point without the State. It was urged that the application of such a law to such traffic makes it a regulation of inter-state commerce, which is declared by the Federal Constitution to be solely within the powers of Congress. The court held, however, that: 1. The statute, "though it may incidentally affect commerce between States, can not be said to be a law regulating commerce among the States, within the meaning of the Federal Constitution, especially when it does not purport to exercise control over any railroad corporation, except those that run or operate in the State, and which have domestic relations with the people of the State. 2. If Congress should, under the provisions of the Federal Constitution, authorizing the same, pass a law regulating the charges of all railroads engaged in inter-state commerce, it may be that the law of this State on that subject might then be confined to charges for the transportation of property wholly within the State." It may be reasonably doubted whether this view of the question would have been taken in a Federal court, and its final determination by the Supreme Court of the United States will be looked for with much interest, for it is a question of grave importance to the public as well as the railroads.

There can be no question that a statute of a State which does amount to a regulation of inter-state commerce, is unconstitutional. The question whether the statute of Illinois, above referred to, is such a regulation, admits of scarcely more doubt. The only ground, it seems to us, on which the theory that it is not, can be based, is that the prohibition of discrimination in freight tariff is intended to be, and is in the nature or a police regulation, intended for the protection of its citizens. Similar exercise of the police power has not been favorably regarded heretofore by the Supreme Court of the United States. In the case of the Hannibal, etc. R. Co. v. Hunsen, 6 Cent. L. J. 121, which was a contest as to the validity of a statute of Missouri, forbidding the importation into the State of any Texas, Mexican or Indian cattle between the first days of March and November of each year; the court held that the law was unconstitutional, on the ground that while the State may enact laws of sanitary police, for the purpose of preventing the spread of infectious diseases, and may establish reasonable quarantine and inspection regulations; it can not interfere with transportation into or through its borders beyond what is absolutely necessary for self-protection; that neither the unlimited power of the State to tax, nor any of its large police powers, can be exercised to such an extent as to work a *practical assumption* of the powers conferred by the Constitution on Congress. In the opinion of the same court as delivered by Mr. Justice Field, in the case of Welton v. Missouri, 3 Cent. L. J. 116, (which was a controversy as to the validity of a statute discriminating, by means of a tax, against goods produced without the limits of the State,) there occurs a sentence which, if followed, will dispose of the assumption by the Illinois court that, in the absence of congressional legislation, the States are authorized to exercise the power vested in Congress. The following is the language there used: "The fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammelled." See, also, the more recent case of Western Union Tel. Co. v. Texas, 14 Cent. L. J. 448, in which a tax upon telegraphic messages to points without the State was held unconstitutional.

PARTNERSHIP — IMPLIED POWER TO BIND THE FIRM BY NEGOTIABLE PAPER.

The power, of one member of a firm to bind his co-partners by contract, which is implied from the relationship, is limited by what is usually termed the "legitimate scope" of the partnership business. The formation of the partnership is itself, the grant of this power to the acting members of the company to transact its business in the usual way.[1] In transactions beyond the scope of such business, however, no such implication will arise, and for obvious reasons. The implication of the power is necessary to the convenient and successful dispatch of the business in which the co-partnership is engaged, and also to protect those dealing with it from imposition and fraud. But beyond the usual limits of that business as established by custom, there is no such necessity, and the implication ceases. It is the natural result, then, of the nature of the partnership relation, that the power of a partner to bind the firm by the use of the firm name upon negotiable paper, exists only when such a transaction is within the legitimate scope of the firm business.[2] The exception to the rule, as here stated, which occurs where a note executed in a transaction beyond the scope of the partnership business is sued upon in the hands of an innocent holder for value, is apparent rather than real. The validity of such paper is due to its negotiable character, which forbids one to deny the authority of one whom he has associated with him in business, to execute it.[3] But where the equity of an innocent holder for value does not intervene, the partnership will not be bound, in the event that the making of such paper is without the legitimate scope of the partnership business, notwithstanding the paper in question may have been given for a valid partnership indebtedness.[4] It follows that, to determine whether the power of binding his co-partners by negotiable paper is to be included in the authorities implied by the existence of the co-partnership, it is necessary to ascertain whether or not the making of such paper is within the legitimate scope of the business in which the firm is engaged. For this purpose partnerships have been classed as: 1. Partnerships in trade, and 2. Partnerships in occupation or employment;[5] or what is perhaps better and more accurate, as, 1. trading, and 2. non-trading partnerships.[6] This classification is not altogether satisfactory; for, while it is the undoubted sense of the authorities that it is within the scope of the business of a trading partnership to make negotiable paper, it does not follow and it is not true that it is always beyond the scope of a non-trading partnership to make such paper. As we shall see hereafter, much depends upon the custom of the trade, of the locality, and even of the parties, in their methods of doing business.

There can be no question that it is within the scope and purpose of a firm engaged in trade as merchants to make negotiable paper in the firm name.[7] So held, too, of a firm of farmers and coopers,[8] and also of one of liquor dealers.[9] But a firm engaged in a manufacturing business, is not engaged in trade; and yet it may be stated as a general principle, that the purchase of supplies or stock-in-trade, to be used in a manufacturing business, is within its legitimate scope, and that a note given for the price of such articles, will bind the firm.[10] Thus, where

[1] Winship v. Bank of United States, 5 Pet. 529; Zuel v. Bowen, 78 Ill. 234; National Union Bank v. Landon, 66 Barb. 189; Breckinridge v. Shrieve, 4 Dana, 375; Deitz v. Regnier, Sup. Ct. Kan., January, 1882.

[2] Kimbro v. Bullitt, 22 How. 256; Zuel v. Bowen, 78 Ill. 234; Deitz v. Regnier, Sup. Ct. Kan., January, 1882.

[3] Freeman v. Ross, 15 Ga. 252; Blodgett v. Weed, 119 Mass. 215; National Union Bank v. Landon, 66 Barb. 189.

[4] Smith v. Sloan, 37 Wis. 285.

[5] Crossthwait v. Ross, 1 Humph. 29.

[6] Smith v. Sloan, 37 Wis. 289.

[7] Winship v. Bank of United States, 5 Pet. 529; Ginrich v. Ulery, 57 Ill. 581; Faler v. Jordan, 44 Miss. 283; Sylverstein v. Atkinson, 45 Miss. 81; Dow v. Phillips, 24 Ill. 249; Storer v. Hinckley (Kirby), Conn. 147; Coursey v. Baker, 7 Harr. & J. 28; Bascom v. Young, 7 Mo. 1; Walworth v. Henderson, 9 La. Ann. 339; Tutt v. Addams, 24 Mo. 186; Pooley v. Whitmore, 10 Heisk. 629; Wagner v. Simmons, 61 Ala. 143; Gregg v. Fisher, 3 Bradw. 261; Osgood v. Glover, 7 Daly, 367; Bacon v. Hutchings, 5 Bush. 595; Thicknesse v. Bromilow, 2 Cr. & Jerv. 425. The limits within which the members of a mercantile firm can bind the co-partnership are indeed wide. In a recent case in Nevada (Davis v. Cook, 14 Nev. 265), it was held that where the firm was engaged in the business of general merchandizing, the purchase of a stone storehouse and a lot of stationery was within its legitimate scope, and that the firm would be bound by a note in the name of the partnership given therefor.

[8] McGregor v. Cleveland, 5 Wend. 475.

[9] Miller v. Hughes, 1 A. K. Marsh. 181.

[10] National Union Bank v. Landon, 66 Barb. 189; Manufacturers', etc. Bank v. Winship, 5 Pick. 11;

the defendants carried on, in co-partnership, a steam saw mill, and the note sued on, was given for supplies, necessary for the hands engaged in carrying on the mill, which had been ordered by one of the partners, it was held that such a note was binding upon the firm. The furnishing of supplies to those engaged in the immediate direction of the business, was essential to the conducting of it and within the scope of the purposes for which the individuals had associated.[11] Where the partners were the proprietors of a tannery, a note given for the hire of a negro tanner, who was a slave, was held to be within the scope of the firm's business.[12] But where the co-partnership was engaged in the milling business, one partner owning the mill, and the other furnishing the money for carrying on the business, a firm note given by the former for a lightning rod, put up on the mill, was held not to be within the scope of the partnership business.[13] The effect of such a purchase was not to further the joint enterprise of milling, but merely to protect the individual property of one of the members of the firm.

In Iowa it has been held to be within the scope of the business of a firm engaged in making collections, for one of the partners to bind the firm by a note for a balance of money collected by it.[14]

There are numerous decisions to the effect that the making of negotiable paper is not within the scope of the business of a firm engaged in agricultural operations,[15] though it must be confessed that the reasons for the distinction between the note of a firm engaged in farming, given for supplies necessary for use upon the farm, and similar paper of a manufacturing firm, do not seem to be apparent upon any basis of principle. The same may be said, too, of a mining partnership, of which it has been held in the English cases, that there is no implied power to bind the firm by negotiable paper.[16] The grounds for the application of the doctrine to partnerships which are purely of occupation, as, for instance, one formed for the practice of meidcine or law, are more plainly reasonable. But upon this branch of the subject, the cases are not by any means harmonious. Thus, in Tennessee it is held (*obiter*) that a partner in the practice of medicine has the power to bind his co-partner by the execution of a note in the name of the firm for the purchase of all things necessary to be used by them in their vocation, such as medicines, surgical instruments, and the like; but has no power to draw bills or make notes for the purpose of raising money; money not being an article for which such a firm has a direct use.[17] This doctrine is questioned in the Wisconsin case of Smith v. Sloan, in which it was held that one of a firm of practicing attorneys can not bind the firm by giving the firm note for a debt due for office rent.[18] The court refers to the Tennessee case, and *apropos* of the opinion there expressed, that money "is not an article for which such a firm has use directly," remarks dryly: "As a proposition of fact, we doubt whether the members of the medical profession will fully indorse the statement of the Tennessee court. We strongly suspect that a firm of practicing physicians has direct use for money, and that the fact would so appear, were members of such firms interrogated on the subject." The doctrine of the Tennessee case, however, receives support from the Kentucky decision of Breckenridge v. Shrieve.[19] There the controversy was over a note given by one member of a firm of lawyers for money borrowed to meet the demands of a person for whom the firm had collected money.[20]

The court, after premising that the right of one partner to bind his co-partner is more or

Barrett v. Swan, 17 Me. 180; Deitz v. Regnier, 1 Sup. Ct. Kan., January, 1882.

11 Johnston v. Dutton, 27 Ala. 245.

12 Newell v. Smith, 23 Ga. 170.

13 Graves v. Kellenberger, 51 Ind. 66.

14 Van Brunt v. Mather, 48 Iowa, 503. See, however, Breckenridge v. Shrieve, 4 Dana, 375.

15 Hunt v. Chapin, 6 Lans. 139; Benton v. Roberts, 4 La. Ann. 216; Stewart v. Caldwell, 9 La. Ann. 419; Ginrich v. Ulery, 57 Ill. 531; Greenslade v. Dower, 7 B. & C. 635; Prince v. Crawford, 50 Miss. 344; McCrary v. Slaughter, 58 Ala. 230; Bass v. Messick, 30 La. Ann. 373.

16 Brown v. Kidger, 3 H. & N. 853.

17 Crosthwait v. Ross, 1 Humph. 23.

18 37 Wis. 296. Citing Greenslade v. Dower, 7 B. & C. 635; Dickinson v. Valpy, 10 B. & C. 128; Bramah v. Roberts, 3 Bing. (N. C.) 936; Hedley v. Bainbridge, 3 Ad. & E. (N. S.) 315; Levy v. Pyne, 1 Car. & Mar. 453; Hasleham v. Young, 5 Ad. & E. 833; Ricketts v. Bennett, 4 M. G. & S. 686; Garland v. Jacomb, L. R. 8 Exch. 218; 6 Moak, 289, and Hunt v. Chapin, and Ginrich v. Ulery, *supra*.

19 4 Dana, 375.

20 As to the note of a firm of collecting agents, see Van Brunt v. Mather, 48 Iowa. 503.

less extensive, as the business or operations in which it is engaged, are more or less extensive, proceeds to say as to the authority of an attorney to borrow money on the credit of the firm: "And this question seems to depend upon the inquiry whether the borrowing of money comes within the scope and object of the association, and is one of its legitimate operations. Money does not constitute the business capital of an attorney and counselor as such; nor is it the instrument with which he carries on his profession. It forms no significant item in the contributions of individuals forming a professional partnership of this character. A principal object of every such association is, doubtless, to acquire money or property, which is owned jointly until divided But if the association be purely professional, the proceeds of the joint labor and skill are acquired and held, not for joint use, but for division and separate use. There is in the legitimate operations of such a partnership, no joint use of money. And if a contingency might be imagined, in which there would be an occasion for the joint use of money, and the necessity for raising it by their joint means or responsibility, the law does not provide for such a contingency by implying a general authority in one partner to contract a joint loan of money, as in mercantile partnerships, but leaves the emergency to such provisions as the partners themselves may make for it, or as the immediate circumstances may indicate."[21]

Where the partnership is formed for a single enterprise, to the accomplishment of which the use of negotiable paper is unnecessary, manifestly the execution of such paper is beyond the scope of the co-partnership business, and it will not be binding on the firm.[22]

There are expressions in many of the cases justifying the conclusion that, although the business in which the partnership is engaged is of such a character as is not usually conducted with the assistance of mercantile paper, still the authority of the individual partners to bind the firm in that way may be implied from a local custom of the trade, or even from the habit and practice of the firm itself in their method of transacting business, from which it may be fairly inferred that the bestowal of such a power was in the contemplation of the parties.[23] In an Indiana case it was held that it was competent to show that in other transactions with other parties prior to the making of the note, one of the defendants had acquiesced in the use of his name by the other partner.[24] And in a Tennessee case, in which it appeared that the firm in question was engaged in a business in which it might or might not be proper to deal in negotiable instruments, to wit, a publishing and printing business, it was held error for the trial court to instruct without qualification, that the firm was liable. Its liability in such a case would depend upon its method of conducting its business.[25] Said the court in that case: "The question whether a given act can or can not be necessary to the transaction of the business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of the persons engaged in it. Evidence on both these points is necessarily admissible, and as may be readily conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another in the ordinary way, consequently no answer of any value can be given to the abstract question: Can one partner bind his firm by such an act? unless, having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which such an affirmation can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business and not in another."[26]

It sometimes happens that the implied power of the partner to bind the firm with negotiable paper is restricted or modified by the articles of copartnership. Such restriction or modification, although binding as between the partners, can have no effect upon the rights of third parties dealing with it, or of the holders of such paper, unless brought

[21] See, also, Levy v. Pyne, Car. & Marsh, 453; Garland v. Jacomb, L. R. 8 Exch. 216.
[22] Gray v. Ward, 18 Ill. 32.
[23] Ginrich v. Ulery, 57 Ill. 531; Benton v. Roberts, 4 La. Ann. 216; Pooley v. Whitmore, 10 Heisk. 629.
[24] Ditts v. Lonsdale, 49 Ind. 521.
[25] Pooley v. Whitmore, 10 Heisk. 629.
[26] Pooley v. Whitmore, 10 Heisk. 635.

home to them by actual notice. Says Chief Justice Marshall: "The articles of copartnership are perhaps never published. They are rarely, if ever, seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world with whom the company is in perpetual intercourse, can not individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These restrictions may bind the partners, but ought not to affect those to whom they are unknown and who trust to the general and well established commercial law."[27]

Where a partnership is, by the terms of the articles, limited to a particular business, if one of the partners executes a note in the name of the firm, for the purchase of property for other purposes than those for which the partnership was first formed, it is incumbent on the person suing on such note to prove affirmatively that the other partners assented to the enlargement of their business, or to the purchase.[28]

How far the grant of power implied in the formation of the partnership can be revoked by any means short of its absolute dissolution is a question of manifest importance. It has been held, generally, both in this country and in England, that a partner may protect himself from the consequences of a future contract merely by giving notice of his dissent, to the party with whom it is about to be made.[29] In Johnson v. Dutton,[30] however, where the co-partnership was composed of three persons, and it appeared that two of them concurred in the making of a note in the partnership name for a purpose within the scope of the partnership business, and that the third had given notice to the public that he would not be responsible for any future debt contracted on account of the co-partnership, and that this notice was brought home to the party with whom the debt was contracted, it was held that where the firm is composed of more than two persons, that act of the majority done after due information to, and consultation with, the minority will be binding upon the firm in spite of the expressed dissent of the minority. That the minority would not be permitted to stop the operations of the concern against the views of the majority.

As to the burden of proof the rule may be stated simply, that where the business in which the firm is engaged, is of such a character that authority to the individual members to make negotiable paper, may be implied, the partnership will be *prima facie* bound by the appearance of the firm name upon such paper, and it will not be incumbent upon the holder of it, to show in the first instance that it was given for a partnership transaction.[31] And paper bearing the signature of such a firm, although given in a transaction beyond the scope of its business, will be protected in the hands of an innocent holder for value by its negotiable character.[32]

St. Louis, Mo. WM. L. MURFREE, JR.

[27] Winship v. Bank of United States, 5 Pet. 561. See, also, National Union Bank v. Landon, 66 Barb. 189; Prince v. Crawford, 50 Miss. 344; Gregg v. Fisher, 3 Bradw. 261; Osgood v. Glover, 7 Daly, 367.

[28] Waller v. Keyes, 6 Vt. 257.

[29] Gallway v. Mathew, 10 East, 264; Willis v. Dyson, 1 Starkie, 164; Leavitt v. Peck, 3 Conn. 125; Feigley v. Sponeberger, 5 Watts & S. 564; Monroe v. Conner, 15 Me. 178.

[30] 27 Ala. 252.

[31] Waldo Bank v. Greely, 16 Me. 419; Sylverstein v. Atkinson, 45 Miss. 81; National Union Bank v. Landon, 66 Barb. 189; Vallett v. Parker, 6 Wend. 615; Gregg v. Fisher, 3 Bradw. 261; Carrier v. Cameron, 31 Mich. 373; Magill v. Merrie, 5 B. Mon. 168; Hamilton v. Summers, 12 B. Mon. 11; Thurston v. Lloyd, 4 Md. 283; Knapp v. McBride, 7 Ala. 19; Barrett v. Swan, 17 Me. 180; Ensminger v. Marvin, 5 Blackf. 210; Littell v. Fitch, 11 Mich. 527; Hogg v. Orgill, 34 Pa. St. 344; Whitaker v. Brown, 16 Wend. 505; Davis v. Cook, 14 Nev. 265.

[32] Freeman v. Ross, 15 Ga. 252; Blodgett v. Weed, 119 Mass. 215; National Union Bank v. Landon, 66 Barb. 189.

WITNESSES CRIMINATING THEMSELVES.

As witnesses are necessary in nearly every court, and especially in all the inferior courts, it is of the highest importance that correct views of the practice in relation to them should be known or should be familiar to the judges and justices. And one of the points of practice is, that which deals with the priv-

ilege or protection of a witness who says or professes that his answer to a particular question will criminate him, and therefore he begs to be excused from answering it. This maxim has always existed, but, strange to say, it is by no means clear that the exact limits within which this privilege is to be allowed have been duly borne in mind. The tendency of late years seems rather to have been that it is the witness himself who is to decide when and how far he shall go and then stop short; and it was easily enough assumed that this was because he alone was in the secret. The point, however, has never been thoroughly well discussed as to the correct view of so familiar a matter; and, though probably judges have generally been liberal in giving effect to the witness' fears and misgivings, yet at last it has been discovered that after all it is dangerous to give an unrestricted liberty to the witness, and that the only safe course is to let the judge or justices first decide as to the reasonableness of the witness' claim. This is important to all who are or may be witnesses, and to all who are or may be judges or justices called upon to superintend the depositions and declarations of such witnesses as may be testifying in the course of litigations and prosecutions. It is thus of the highest importance to justices of the peace, who so often have to be the first to hear and examine witnesses on those very matters where the privilege in question comes most frequently into play.

The *dictum* of eminent judges like Lord Truro, Jervis, C. J., and Maule, J., about thirty years ago, seemed certainly to lead the profession to the conclusion that it was rather for the witness than the judge to determine when the question put was not to be answered. In Fisher v. Ronalds,[1] a witness on a trial as to a bill of exchange given for gaming purposes was asked was there a roulette table in the room? The friendly counsel thereupon rose and asked the judge to caution the witness, and the judge did then and there caution the witness, that he was not bound to answer the question, as the answer might criminate him. The witness in that case was the occupier of the house, who had let his room to a club supposed to be a gambling club, and he was speaking as to what he saw once. The witness was of course glad to take the hint, and refused to answer. And a new trial was afterwards applied for, on the ground that the judge was wrong. That judge was Cresswell, J., and the rest of the judges, Jervis, C. J., Maule, J., Williams, J., and Talfourd, J., all said the judge was right. Maule, J., observed: "We need not decide upon the present occasion that the statement of the witness is conclusive, though I think the judge is bound by the witness' oath; otherwise you might exhaust all possibilities consistent with a man's innocence, and so convict him even of murder." And only a short time before, in the case of Short v. Mercier,[2] in a suit about stock jobbing transactions, where a stockbroker refused to answer interrogatories, Lord Truro, L. C., said that a defendant, in order to entitle himself to protection, was not bound to show to what extent the discovery might affect him, for to do that he might often times of necessity deprive himself of the benefit he was seeking; but it would satisfy the rule, if he stated circumstances consistent on the face of them with the existence of the peril alleged, and which also rendered it extremely probable. These decisions, no doubt, gave the cue for many years to the practice, and most people thought that the judge ought scarcely at all to interfere with the liberty of the witness under examination as to when he should refuse to answer on such a ground.

No case of much importance occurred involving this question, till ten years later, when Reg. v. Boyes,[3] was decided. That was a criminal information for bribery filed by the Attorney-General by the direction of the House of Commons. One of the persons charged in the information to have been bribed by the defendant, was called on as a witness. On his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the great seal, which the witness accepted, but still he declined to answer. At this point it is necessary to state what was the effect of this offer of a pardon under the great seal. The act of settlement,[4] enacts that no pardon under the great seal shall be pleadable in bar to an impeachment by the Commons in Par-

[1] 12 C. B. 762.

[2] 3 Mac. & G. 216.

[3] 1 B. & S. 311.

[4] 12 & 13 Will. 3, c. 2, s. 3.

liament.[1] Thus a pardon under the great sea was, or at least was in that case, held to be wholly inoperative to prevent impeachment by the House of Commons; nevertheless, the witness would be protected against all ordinary prosecutions in courts of law. Thus the only danger was, that though the witness could be in no danger from any criminal prosecution, yet there was just a possibility that the Commons might impeach him, and in that event the pardon would not protect him. The witness in that case thought he would not run the risk of impeachment, and declined to answer. The judge thought it doubtful whether the witness was in these circumstances bound to answer. But afterwards a sort of compromise was come to, and ultimately the witness was told he was bound to answer, and that the question was to be put to the Court of Queen's Bench, as to whether, in the circumstances, the witness was bound to answer.

The case was elaborately argued, and the court took time to consider. The main contention was, that a bare possibility of legal peril was sufficient to entitle a witness to protection, and that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclusive. The court came to the conclusion that this last contention for the witness was untenable, and the following was the opinion delivered. To entitle a party called as witness to the privilege of silence, the court must see from the circumstances of the cases and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation a judge is bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril. Moreover, the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party called upon to give evidence in a proceeding, *inter alia*, protection against being brought by means of his own evidence within the penalties of the law. It would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. To suppose in that case that the witness ran the slightest risk of an impeachment by the House of Commons was simply ridiculous. Accordingly the court held that he was bound to answer, and that the presiding judge was bound to compel him to answer.

Though Reg. v. Boyes was a leading case and seemed to be a very clear decision, yet it is obvious that it is by no means easy for a presiding judge to take upon himself to decide the preliminary question whether the witness is acting reasonably or unreasonably. In that case it was taken for granted that there was no possible objection except the mere fear of the impeachment. Therefore, that was a comparatively easy case to decide. But in a great majority of cases the facts and surrounding circumstances do not allow of so clear and sharp an outline to the judicial eye. And, therefore, though it must be taken to be laid down as incontrovertible after that case that the witness' mere assertion of danger was not to be deemed conclusive, but that he must give some fair and rational clue as to the source of his danger so as to satisfy the presiding judge, yet there were and are great difficulties in acting on the rule there laid down. It demands of the judge an acute and penetrating glance into the complications of the whole case before he can be sure that the witness is merely pretending to

be alarmed in order to get rid of a disagreeable duty in answering the questions put.

The recent case of *Ex parte* Reynolds,[5] is a fair example of the difficulties which courts will have in carrying out the rule of practice now established as to the reasonableness of a witness' objection to answer on the ground of criminating himself. In that case a bankrupt was examined as to a certain post-nuptial settlement which the creditors had their doubts about. The settlement professed to be in favor of the bankrupt's wife, and one of the bankrupt's brothers was a trustee. This brother, who was an auctioneer, had filed a bankruptcy petition under which the bankrupt came to be examined. This brother was subpœnaed, and the object of the intended examination on behalf of the trustee in bankruptcy was to discover whether this brother was really named a trustee in the said deed, and had executed it in that character; what, if anything, had been done under the settlement; and if any and what moneys had come into his hands between the date of execution and the adjudication of bankruptcy. The witness appeared in court, but to the greater number of the questions the witness by the advice of counsel declined to answer on the ground that the answers might tend to criminate him. For example, he was asked if that was his handwriting and his name to the deed. He refused to answer these and many other similar questions. The registrar thought some of the questions were legal, and such as witness was bound to answer, and the registrar referred the further examination to the chief judge in bankruptcy. The chief judge held that it was not exclusively for the witness to decline answering, unless the judge was satisfied there was reasonable ground. And he remitted the matter to the registrar, with his opinion that many of the objections of the witness were frivolous and trifling. On appeal the Court of Appeal has at some length reviewed the question involved, namely, how far it is the absolute privilege of the witness to decline answering. The result is, that the court agrees with the chief judge, and has ordered the witness again to be examined, and he will then be bound to make answer unless he can give some satisfactory reason why and how the answer is likely to criminate. Such a decision is no doubt most in accordance with common sense, and though it may be difficult for judges and justices to act upon it satisfactorily, still it is no more difficult than a hundred other things which they are expected to do, and which it is found they can do very satisfactorily. The Master of the Rolls said the witness probably thought that he and his brother the bankrupt might be indicted for conspiracy to cheat the creditors. Still this was not a necessary consequence. At all events there could be no great harm in the witness answering whether he was the trustee of a voluntary settlement of certain stocks and other kinds of property, and what is become of these. Perhaps the witness' only motive was to give as little help as possible to the creditors. That was, however, not sufficient justification for not answering fair questions.

The rule of practice that the judge must first be satisfied as to the reasonable apprehension of a witness refusing to answer before the refusal can be allowed, is now clearly settled by the above cases. — *Justice of the Peace.*

[5] 15 Cent. L. J. 13.

CONTRACT—REAL ESTATE BROKERAGE—STATUTORY CONSTRUCTION — A STATE NOT A TERRITORY.

WATSON v. BROOKS.

United States Circuit Court, District of Oregon, September 27, 1882.

1. A contract to sell real property for a commission is performed when the broker procures a person who is able to pay for the same to enter into a valid contract to purchase upon the terms proposed, or when he induces such person to offer to pay for the property and take a conveyance thereof upon being allowed a reasonable time to examine the title thereto, which offer is refused by the owner, on the ground that the time allowed the broker within which to effect the sale is about to expire.

2. The ruling in New Orleans v. Winter, 1 Wheat. 91, that a territory is not "a State," within the meaning of that term, as used in the Constitution in making the grant of judicial power to the United States, and that, therefore, a resident of the former can not sue in the Federal courts, as a citizen of a State followed, but questioned.

William H. Effinger, for the plaintiff; *H. Thompson* and *Seneca Smith*, for defendants.

DEADY, J., delivered the opinion of the court. The plaintiffs, William P. and Matthew P. Wat-

son, citizens of Washington Territory, bring this action against the defendants, S. L. Brooks and Phœbe Dekum, of Oregon, to recover the sum of $2,500, upon the following allegations of facts: That during the year 1881 the defendants owned a certain property at the Dalles, Oregon, known as the "Dalles Water Co.," and engaged plaintiffs, as their agents, to sell the same within a certain number of days thereafter for the sum of $50,000, and authorized them to represent that they would, "upon a sale being affected, make to the purchaser a good and sufficient conveyance" of the property, "with covenants of general warranty," for which service the plaintiffs were to receive a commission of $2,500, "or all in excess of $47,500 for which they would sell the property;" that on the last day of the time allowed the plaintiffs secured a purchaser who was able to pay the sum of $50,000 therefor, and offered to do so upon receiving a conveyance thereof, "provided the defendants would allow him by his solicitor to search the title to the same, so that he might be advised as to whether they could convey a perfect title thereto, but that the defendants refused to permit said search, or to give time therefor, and thereby refused to complete the sale of said property," and "capriciously and without justifying cause obstructed and prevented a consummation of said sale."

The defendants demur to the complaint, for that: 1. The court has not jurisdiction of the parties defendant nor the subject matter; and 2, the facts stated do not constitute a cause of action.

The case was argued upon both points of the demurrer, and the parties desire that both should be considered by the court. Upon the second cause of demurrer the defendants claim that the plaintiffs agreed to make a sale of the property which was not done by simply finding a person who was willing and able to purchase the same in case the title upon examination proved good. A sale of real property is an agreement by the vendor to convey the title thereto, or an estate therein to the vendee for a cartain valuable consideration then or thereafter to be paid. The conveyance is not a part of the sale but only a consequence of it; and the former is complete without the latter, even if it is not followed by it. The legal title remains in the vendor, notwithstanding the sale, until a conveyance is made to the vendee. Bouvier, Sale, sub.19. The plaintiffs undertook to make a sale of this property for a certain price within a certain time, and upon a representation authorized by the defendants to the effect that the title was good. To do this, it was necessary to find some one who was not only able and willing to purchase upon the terms proposed, and within the time limited, but who should also agree to do so. And this a reement to be valid and binding should be in writing and signed by the purchaser. Or. Civ, Code, sec. 775, sub. 6.

In such case it matters not whether the transaction is consummated by the delivery of the deed and the payment of the purchase money or not, the person negotiating the sale has performed his undertaking and is entitled to his compensation therefore. The sale being effected by a valid agreement to a solvent purchaser, the broker has fulfilled his contract and is entitled to his commission, and if the purchaser fails to comply with his agreement the vendor has his remedy thereon.

And if the agreement to purchase is not reduced to writing and therefore not binding, but the parties proceed thereon and complete the transaction by the delivery of the conveyance and the payment of the purchase money, still the broker is entitled to his commission, because the sale made by him in fact is recognized and acted on by the parties, and the vendor has the benefit of his services in bringing the same about.

The case under consideration, however, is different from either of these. The contract of sale does not appear to have been reduced to writing, nor was it followed by a conveyance of the premises to the proposed purchaser. But no objection was made by the defendants to the contract on that account or to the solvency of the purchaser, but they refused to go on with the transaction solely upon the ground that the plaintiffs had not effected the sale within the time limited, because the purchaser required a reasonable time thereafter to examine the title to the property before paying for it and taking the conveyance. It is also well understood, and was so assumed on the argument, though it is not so distinctly alleged, that owing to the situation of the parties and the property there was not sufficient time left for the examination of the title after the contract of sale was made, and that therefore the refusal of the defendants to accept the offer to purchase subject to such examination was in fact a refusal to go on with the transaction, upon the ground that the sale was not and could not be completed within the time agreed upon. And this, it seems to me, is the turning point in this case, so far at least as this question is concerned, could the plaintiffs effect a sale of this property within the terms of their employment, subject to the examination of the title? I think they could, and that having done so they complied with the obligation of their contract and were entitled to their commission. If the contract of sale was made without any stipulation, as to the examination of title, the right of the purchaser to the examination would be implied; and if upon such examination it should appear that there was a substantial defect in the title, he might decline to proceed, and still the plaintiffs would be entitled to their commission.

My conclusion upon this point is, that the plaintiffs affected a sale of this property — procured a purchaser for it—within the terms of their agreement, and that the defendants wrongfully refused to complete the transaction upon the erroneous assumption that such purchaser was not entitled to examine the state of the title before paying the purchase money and taking the conveyance, un-

less he could do so within the time limited for making the sale. This being so, it follows that the plaintiffs complied with their engagement, and that, so far as it appears, it was the fault of the defendants that the transaction was not completed in accordance with the sale. In McGavock v. Woodlief, 20 How. 227, the Supreme Court, in a case involving this question, says: "The broker must complete the sale; that is, he must find a purchaser in a situation, and ready and willing to complete the purchase on the terms agreed on before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale." The following cases have been examined in the consideration of this question, and though not exactly in point, they will be found to shed more or less light upon it: Middleton v. Findla, 25 Cal. 76; Blood v. Shannon, 29 Cal. 393; Phelan v. Gardner, 43 Cal. 306; Knapp v. Wallace, 41 N. Y. 477; Fraser v. Wyckoff, 63 N. Y. 445; Cook v. Fiske, 12 Gray, 491; Wharton on Agency, sec. 325.

But upon the other point the authorities are against the jurisdiction. The Constitution (art. III., sec. 2) declares that the judicial power of the United States shall extend to controversies between citizens of different States and citizens of a State and aliens; and this jurisdiction has since been conferred on the circuit courts where the matter in dispute exceeds the sum or value of $500. 1 Stat. 78; 18 Stat. 470. At an early day it was held in Hepburn v. Ellzey, 2 Cr. 445, that the District of Columbia is not "a State" within the meaning of that term as used in the article of the Constitution defining the judicial power of the United States, and therefor a resident thereof could not sue in the United States courts as a citizen of a State. Afterwards, in New Orleans v. Winter, 1 Wheat. 91, the question arose in regard to a Territory, and it was held that a Territory is in the same category as Columbia; and though both are States—political societies—in the general sense of the term, neither are in the sense in which the term is used in the Constitution, where it is intended only to comprehend "members of the American confederacy." In Barney v. Baltimore City, 6 Wall. 287, these rulings were followed without question upon the principle of *stare decisis*. But it is very doubtful if this ruling would now be made if the question was one of first impression; and it is hoped it may yet be reviewed and overthrown. By it, and upon a narrow and technical construction of the word "State," unsupported by any argument worthy of the able and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the District of Columbia and the eight Territories of the United States are deprived of the privilege accorded to all other American citizens as well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home. Indeed, in the language of the court, in Hepburn v. Ellzey, *supra*, they may well say "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the Union, should be closed upon them." But so long as this ruling remains in force, the judgment of this court must be governed by it.

The demurrer is sustained.

FORGERY — JURISDICTION — FORGERY COMMITTED IN ONE STATE — INSTRUMENT UTTERED IN ANOTHER.

LINDSAY v. STATE.

Supreme Court of Ohio, September 26, 1882.

1. The jurisdiction of a forgery is determined by the place of uttering the instrument, and it is no defense to show that although the instrument was uttered in the county where the prosecution was instituted, the forgery was accomplished without the limits of the State, and that the accused was never within the State and owes allegiance to another State or government.

2. In a prosecution for uttering forged paper with intent to defraud, it is competent to show the possession by the prisoner of other forged instruments of a similar character, as tending to show guilty knowledge of the accused.

Error to the Court of Common Pleas of Jefferson County.

The plaintiff in error and one John T. Morris were jointly indicted in Jefferson County. The charge is, that they did unlawfully and feloniously utter and publish in said county, as true and genuine, a certain false, forged and counterfeited deed of real estate purporting to be executed and acknowledged by Maurice F. Thornton and wife, before Herman E. Shuster, a notary public of the State of Missouri, and to convey certain lands in that State to James Turnbull, of Jefferson County, Ohio.

The plaintiff in error had a separate trial and was convicted and sentenced. The evidence tended to show that the deed was a forgery executed in St. Louis by the notary public by the procurement of Lindsay, who then and thereafter, until forcibly brought to Ohio, was never in this State; that this deed was delivered by Lindsay, or his agent, to his co-defendant, Morris (who is awaiting his trial), and by him was sent by mail to T. and D. Hall, real estate agents in Steubenville, through whom it was uttered and published by a sale of the land to Turnbull. T. and D. Hall were the innocent agents in the transaction and received and accounted for the purchase money less commissions. The theory of the prosecution is, that Lindsay, in the State of Missouri, procured the deed to be there forged, and through Morris, sent to T. and D. Hall, at Steubenville by mail, to be there uttered and published, and that T. and D. Hall were the innocent agents

of Lindsay, or of Lindsay and Morris, in defrauding Turnbull by a pretended sale of the land described. There is evidence tending to show that Morris was innocent, and also that he was a confederate of Lindsay in the transaction; but if he was, all his acts were done in Missouri, and consisted of sending the deed to T. and D. Hall at Steubenville, and of conducting the correspondence with them. During the progress of the trial, and for the purpose of proving guilty knowledge on the part of Lindsay, there were admitted certain other forged deeds published by Lindsay and others found in his possession, purporting to convey other lands to other parties. These deeds are either general warranty deeds, like the one described in the indictment, or trust deeds, purporting to convey lands to secure certain notes and bonds.

The foregoing statement sufficiently presents the grounds for the legal questions saved for report.

JOHNSON, J., delivered the opinion of the court:

Two questions are presented on the foregoing statement. 1st. Had the court jurisdiction over the plaintiff in error? and 2d. Were the conveyances of other lands admissible for the purpose of showing guilty knowledge?

1st. As to the jurisdiction of the court. Is the crime charged an extra-territorial crime? Was it committed in Missouri or Ohio? If he were indicted for the forgery of this deed he could not be punished in Ohio, as it is conceded that all his acts that constitute that crime were committed in Missouri. When he procured the notary in St. Louis to forge the signatures and the acknowledgment of the grantors, with the criminal intent, the crime of forgery was consummated in the State of Missouri. But this is not the charge in the case at bar. It is for knowingly uttering and publishing as true and genuine a false and forged deed. It is wholly immaterial where the forgery was committed. The question therefore is: Was this deed uttered and published in Jefferson County, Ohio, and was Lindsay guilty of this crime? That this forged deed was uttered and published in Ohio by T. and D. Hall, who supposed it was genuine, is clear from the evidence. Now it is assumed that the jury had evidence to warrant them in finding that T. and D. Hall did so utter and publish this deed by the procurement of Lindsay. The crime was therefore completed or consummated in Ohio, through the instrumentality of an innocent agent.

It is wholly immaterial whether his co-defendant, Morris, was his confederate or his dupe, as in either case, the acts of Morris by correspondence mailed in St. Louis to T. and D. Hall, were simply the means used to consummate a crime in Ohio. The crime had its inception in Missouri, but it was committed in Ohio, by innocent agents. If a letter containing a forged instrument is mailed at one place to be sent to another, the venue must be laid where the letter is received. 3 Greenl., sec. 112. The crime of uttering and publishing is not complete until the paper comes to the hands of some one other than the accused, and if it be sent by mail for the purpose of being there used, the crime is not consummated until it it is received by the person to whom it is to be delivered. It is a fundamental principle that a person is responsible criminally for acts committed by his procurement, as well as for those done in person. The inherent power of the State to punish the uttering and publication of forged instruments, within its territorial limits, without regard to the place where the forgery was committed, or purpose was formed, is essential to the protection of her people. It is now a generally accepted principle, that one who in one county or State employs an innocent agent in another to commit a crime, is liable in the latter county or State. Robbins v. State, 8 Ohio St. 131; Norris v. State, 26 Ohio St. 217; 1 Wharton on Criminal Law, 7th ed., sec. 210; Same, sec. 278. See also Commonwealth v. Macloon, 101 Mass. 1; Commonwealth v. Smith, 11 Allen, (Mass.) 243; Commonwealth v. Blanding, 3 Pick. 304; R. v. Johnson, 7 East, 95; Whar. Conf. of Laws, secs. 877-921; People v. Adams, 3 Denio, 190, affirmed 1 Comstock, 173; United States v. Davies, 2 Sum. 482; State v. Wychoff, 2 Vroom (N. J.) 68; Commonwealth v. Gillespie, 7 Serg. & R. 469; Stillman v. White Rock Co., 6 Wood & M. 538; R. v. Garrett, 6 Cox, C. C. 260; R. v. Jones, 4 Cox, C. C. 198; State v. Grady, 34 Com. 118. [Compare *In re* Diilon (Sup. Ct. Kan.) 15 Cent. L. J. 495.—ED. CENT. L. J.]

2. Were the deeds and deeds of trust admissible for the purpose of showing guilty knowledge? It is essential that the prosecution should, by competent evidence, satisfy the jury that the accused had such knowledge. These instruments were either general warranty deeds, like the one described in the indictment, or deeds of trust to secure notes and bonds for the payment of money. It is conceded they were all forgeries. Some of them were found in Lindsay's possession, and some of them had been uttered by him. They were all deeds of land, some conveying the title absolutely to the grantee, and others to vest such title in the grantee in trust, to secure the payment of money. Under the statute of Ohio (R. S. 7091), it was an indictable offense to forge such instruments, or to utter and publish them with intent to defraud.

The crime here charged is, that of uttering and publishing a forged deed of general warranty. The claim is: 1st, That none of these instruments were admissible, because of the general rule, that another and distinct crime, in no way connected with the one charged, can be given in evidence on the trial of the crime charged; and 2d, That even if the warranty deeds were admissible, the deeds of trust were not, as not being of the same description with the deed described in the charge. That the warranty deeds were admissible is well settled. "In proof of the criminal uttering of a forged instrument, it is essential to

prove guilty knowledge on the part of the utterer. And to show this fact, evidence is admissible that he had about the same time uttered, or attempted to utter, other forged instruments of the same description; or, that he had such others, or instruments for manufacturing them, in his possession." 3 Greenleaf on Evidence (8th ed.), sec. 111. Hess v. State, 5 Ohio, 9; Reed v. State, 15 Ohio, 217; Shridley v. State, 23 Ohio St. 130; Bainbridge v. State, 30 Ohio St. 264. But it is claimed that these deeds of trust were not "of the same description" as the warranty deed, described in the indictment. The words "of the same description," are taken from the above citation from 3 Greenleaf's Ev., but in 1 Greenleaf's Ev., sec. 53, the text reads: "So an indictment for knowingly uttering a forged document, or a counterfeit bank note, proof of the possession, or the prior or subsequent utterance of other false documents or notes, though of a different description, is admitted as material to the question of guilty knowledge or intent." The rule as stated by Phillips is: "Thus in a prosecution for uttering a bank note, bill or promissory note, with knowledge of its being forged, proof that the prisoner had uttered other forged notes or bills, whether of the same kind or a different kind, or that he had other forged notes or bills in his possession, is clearly admissible, as showing that he knew the note or bill in question to be forged." 1 Phillips on Ev. 768-9. In a note by Cowen & Hill, which discusses the cases on this rule, the conclusion reached is that, "on the whole, the decided weight of authority would seem to be in favor of receiving the evidence, whether the other bills, etc., be *ejusdem generis* or not.

This conclusion, when applied to trials for uttering forged and counterfeited instruments, is abundantly supported by the authority of cases cited in notes to the foregoing citations. Also, King v. Whitley, 2 Leach C. C. 983; Rex v. Ball, Russ & Ry. C. C. 132; Sunderland's Case, 1 Lewin C. C. 102; 2 Russel on Crimes, 404 *et seq.*; Cook v. More, 11 Cush. 216; 1 Greenleaf, sec. 53, n. 3.

As guilty knowledge is an essential ingredient of this class of crimes, and as the burden is on the prosecution to prove such knowledge, the reason of the rule is apparent. Without the aid of other acts and conduct of the accused, than the one charged, it would be impossible to prove this allegation. Proof of the single act charged will not of itself warrant the inference of guilty knowledge. Hence this exception to the general rule, that other acts of the accused, calculated to raise a presumption of such knowledge, are admissible. Other acts, which, in their nature, do not aid the jury in determining this question, are not competent; but when such acts or conduct tend to raise a presumption of such knowledge, they are admissible. In the case at bar, the charge is for knowingly uttering a forged deed with intent to defraud; that is, by this pretended conveyance of the title, to obtain money fraudulently. The forged deeds of trust were in the nature of mortgages to secure notes and bonds for money. They conveyed the title to a trustee to secure those who advanced money on the faith of this conveyance. Although these instruments are not identical in tenor or effect with an absolute deed, yet the fact, if it be one, that the accused was engaged in obtaining money by this class of forged instruments, is calculated to raise a strong presumption that he knew that a deed of warranty used to accomplish the same purpose, that is, to obtain money, was also forged.

The general conduct of the accused in uttering forged deeds of trust, to raise money about the same time, tends to show he was engaged in that business, and the inference is natural and cogent, that he knew the warranty deed he uttered in the case at bar was of the same character.

Judgment affirmed.

REPLEVIN — PROPERTY DESTROYED BY ACT OF GOD—LIABILITY.

DE THOMAS v. WITHERBY.

Supreme Court of California, July 25, 1882.

Where property which has been wrongfully replevied is destroyed by act of God, such destruction will not relieve the liability of the wrong-taker.

Appeal from the San Diego Superior Court.

The plaintiff had replevied a lot of cattle seized under an execution issued against one Charles Thomas. The action being prosecuted to judgment, it was adjudged that the plaintiff, Geneva de Thomas, was the owner and entitled to the possession of all the property in controversy, except forty-five head of California stock, valued at $900, and two cows, known as "graded stock," of the value of $1,040; and as to these cattle it was adjudged and determined by the court that they were, at the time they were taken out of the possession of the sheriff, the property of Charles Thomas. The judgment of the court in respect thereto was that "the said defendants, Joseph Coyne and O. S. Witherby, have and recover of and from the plaintiff, Geneva de Thomas, said forty-five head of California stock and said two graded cows, if a return thereof can be had, and in case a return can not be had, that they have recover from said Geneva de Thomas the sum of $1,040, that being the value thereof, and damages assessed at one dollar, with costs of suit."

A writ of execution having been issued, directing the seizure of the property mentioned, or if the same could not be found, that the value thereof be made out of the personal or real property of the said de Thomas, the latter elected to pay, and the defendants, Coyne and Witherby, elected to take the sum of $900 in lieu of the return of the forty-five head of California stock, and that sum was accepted and received in satis-

faction *pro tanto* of the execution issued on the judgment in the action of replevin, leaving the execution in the hands of the coroner unsatisfied as to the two graded cows, and the sum of $1,040 fixed by the judgment of the court as the value thereof. The plaintiff now seeks to enjoin the further enforcement of the execution, for the reason that before the rendition of the judgment in the replevin suit, or the issue of the writ of execution, the said two cows, known as "graded stock," died, thereby rendering it impossible for plaintiff to return said cattle to the defendants; and that the death thereof was caused by the act of God, and did not occur by any default, abuse, neglect, mismanagement or want of care on the part of the plaintiff or any other person.

To the complaint a demurrer was interposed on behalf of the defendants, which was sustained, and the plaintiff declined to amend, a final judgment was entered thereon, from which judgment the plaintiff appeals.

Brunson & Wells and *Hotchkiss*, for appellant; *Chase, Arnold & Hunsaker*, for respondents.

MORRISON, C. J., delivered the opinion of the court:

The action of the plaintiff was brought under sections 509 and 510 of the C. C. P., which provides for actions to recover the possession of personal property, and the delivery thereof to the plaintiff. It is a statutory proceeding analagous to the common law action of replevin; and by section 667 of the same Code it is provided that "if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return can not be had."

When it appears on the trial that the property has been destroyed, that it no longer exists in specie, and can not, therefore, be returned, a judgment for damages alone will not be reversed. Brown v. Johnson, 45 Cal. 76.

In some of the cases to which we have been referred, it has been held that the plaintiff, who obtains the possession of personal property by replevin, is excused from returning the same in case it has died since the seizure, without any neglect or fault on the part of the party taking it. This was the doctrine laid down by the Supreme Court of New York in Carpenter v. Stevens, 12 Wend. 589. It was there held that "when property, taken by virtue of a writ of replevin, is a living animal, and there is a judgment of *retorno habendo*, in an action on the replevin bond for a breach of its condition, it is a good plea in bar that before the judgment in the replevin suit, the animal died without the default of the plaintiff in such suit;" and to the same effect in the case of Melvin v. Winslow, 10 Me. 397. But an examination of more recent cases and later authorities, convinces us that the above cases do not lay down the correct rule on this subject.

The case of Carpenter v. Stevens, *supra*, was considered by the Superior Court of New York in the case of Suydam v. Jenkins, 3 Sandf. 614, where it is said: "The inferences that have been stated seem to follow in a logical sequence, and if the decision in Carpenter v. Stevens were admitted to be law, we should find it difficult to resist them. But this admission we can not make. The decision is one of those which we regret, but are constrained to say we can not follow. It appears to us to be wrong in principle, and it is plainly contradicted by many authorities. The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods or pay the value at the time of the execution of the bond. We can not think that the wrong-doer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. * * * * A plaintiff who, without right or title, has seized the property of another by writ of replevin, is as much a wrong-doer as a defendant in trover. No reason can be given why his liability should be less extensive; and, in fact, when the replevin suit is terminated, although he can not be treated as a trespasser, he may be sued in trover at the election of the defendant. Yale v. Passett, 5 Denio, 21. The decision in Carpenter v. Stevens, is plainly inconsistent with the prior decision of the same court in Rowley v. Gibbs, 14 Johns. 385, in which the defendants in a replevin suit, in addition to a return of goods, were held to be entitled to damages for a deterioration in their value, from the time of replevin, although it was not pretended that the decrease in value was attributed in any degree to the act or default of the plaintiff; and it is irreconcilable with the numerous cases in which it has been held expressly, or by a necessary implication, that in a suit upon the replevin bond, the value of the property, as fixed by the penalty of the bond, is, at the election of the plaintiff, the true measure of damages." Citing Mattoon v. Pearce, 12 Mass. 406, and numerous other cases.

The case of Carpenter v. Stevens is referred to with disapprobation by Wells in his recent work on Replevin. He says: "Questions frequently arise as to the effect the death or destruction of the property, pending the suit, will have on the rights of the parties. Upon this question the authorities, with few exceptions, can be easily harmonized. It was said in a New York case that when the property sued for is a living animal, and it dies, it is a good plea to say that it is dead. This ruling was based upon the idea that the return had become impossible by act of God; but the ruling has been questioned more than once. To permit a defendant who wrongfully takes possession to claim that he holds it at the risk of the real owner, and not at his own, and claim immunity for accident, would be unjust in the extreme. The wrongful taker of property, when called upon to surrender it to the rightful owner or pay the value, can not defend himself from judgment by showing his inability to deliver it through death or otherwise." Secs. 600, 601. The death of slaves, pending the action for them, has often

been held not to defeat the plaintiff's right to a judgment for them or their value. Id. sec. 602. See Carrel v. Early, 4 Bibb. 270; Caldwell v. Fenwick, 3 Dana, 333; Scott v. Hughes, 9 B. Monroe, 104; Drake on Attachment, sec. 341; Hinkson v. Morrison, 47 Iowa, 167.

Sedgwick in his work on Damages, vol. 2, marginal page 500, also refers with disapprobation to the case of Carpenter v. Stevens, and says: "In a case in New York it was decided in a suit on the replevin bond that the non-return of the property was excused by its inevitable destruction before judgment. This decision was based on the old rule that if the condition of a bond became impossible by the act of God, the penalty is saved. But it seems contrary to principle, and has been expressly disapproved of. As between parties to a contract it seems reasonable that all interested in its execution should bow to the superior power which renders its performance impossible. But it can not be contended that a wrong-doer should be excused by any subsequent event. Nor do the analogies of the law justify any such decision."

In the case of Mills v. Gleason, 21 Cal. 283, the court say: "A failure to prosecute (replevin) is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained."

It seems to us that the principle laid down by the court, in the case above referred to (45 Cal.), is applicable here, and is decisive of the present case. There the judgment was for the value of the property and damages merely, and the Supreme Court, assuming that it appeared to the court in which it was tried that the thing could not be returned, for the reason that it had been destroyed, sustained the judgment.

Perhaps we have given to this case a more elaborate examination than was necessary, but in view of the conflict in the authorities it did not seem improper to refer in some detail to them. The weight of authority is manifestly against excusing the party who has replevined goods from returning the same or responding in damages for their value, because they have been lost by the acts of God, and it appears to us that upon no sound principle can he be excused. A plaintiff not being the owner of goods who takes them out of the possession of the real owner, holds them in his own wrong, and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when at the end of perhaps a protracted litigation it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he can not, on principle or authority, be excused from satisfying said judgment under a plea that the property had been lost in his hands, even by the act of God.

The demurrer to the complaint was properly sustained, and the judgment must be affirmed.

NEGLIGENCE — RAILWAY FIRE—SUBSTITUTION OF INSURANCE COMPANY FOR INSURED.

BRIGHTHOPE RY. CO. v. ROGERS.

Supreme Court of Appeals of Virginia.

1. An insurance company which has paid the assured the amount due him upon the policy can maintain an action for reimbursement, in the name of the assured, against the person by whose misconduct or negligence the loss was occasioned.

2. It is admissible, in an action for damages, caused by a railway fire, to show that the defendant's locomotive, on other occasions than that for which the action was brought, emitted sparks and communicated fire along the track and right-of-way.

3. It is incumbent on a railroad company to use all practicable and reasonable precautions to prevent injury to the property along their right-of-way by fire from their locomotives: (a) by keeping their road and right-of-way clear from all accumulation of combustible materials; (b) by using the most approved and best mechanical appliances and safeguards, in the nature of ash pans and spark arresters, such as are generally adopted by and used upon modern railroads in this country; and a failure to do so is negligence, and will render it liable in damages for a fire consequent thereupon.

This was a writ of error to a judgment rendered by the circuit court of Chesterfield county, in a suit brought by George J. Rogers, who sues for the benefit of the Watertown Fire Insurance Company, of New York, against the Brighthope Railway Company. The facts of the case, other than those stated in the opinion, and which are necessary to be known for a proper understanding of the points decided, are these: Rogers had a lot of cord wood cut and piled on the line of the Brighthope Railway Company, which he insured with the Watertown Fire Insurance Company by two policies, aggregating $1,500. The wood was set on fire by the locomotive of the defendant, and about $1,000 worth of it destroyed. Rogers claimed the insurance. The claim was compromised at $701.51, and this amount was paid him by the insurance company, which then sued the defendant in his name, alleging that the fire was caused by the railroad company's negligence. After the suit was brought, Rogers executed a formal release to the railroad company of all claims and demands, on his part, against them on account of the loss, and declined to be a party to the suit. This was pleaded by the defendant, and the court asked to dismiss the suit, but it refused to do so. The negligence was proved to the satisfaction of the jury, a verdict rendered in favor of the insurance company for the amount paid Rogers ($701.61), and judgment rendered thereon, to which a writ of *supersedeas* was awarded by one of the judges of this court.

The other facts and the instructions given are sufficiently stated in the opinion of the court.

D. S. Houndshell, for the plaintiff in error; *B. H. Nash* for the defendant in error.

STAPLES, J., delivered the opinion of the court:

The first question to be considered here is whether an insurance company which has paid the assured the amount due him upon the policy, can maintain an action for reimbursement in the name of the assured against the person by whose misconduct or negligence the loss was occasioned. The learned counsel for the defendants, in a very elaborate argument, insists that the action can not be supported, because there is no privity between the insurer of the property and the wrong-doer, and a right of action sounding in tort is not assignable at common law, and can not be the subject of the equitable doctrine of subrogation. We are of opinion, however, that the question can not be regarded as an open one; that the right to maintain such action has been settled by a long train of decisions of the highest courts of England and America. As far back as the case of Lainsbury v. Mason, reported in 3 Douglas, 61, the doctrine was recognized by Lord Mansfield, and has been again and again reaffirmed by the English judges. In the United States the decisions are almost uniformly the same way, as may be seen by reference to the case of Hart v. Western Railroad Company, 13 Met. 103, where the whole subject is exhaustively discussed by Chief Justice Shaw, and the grounds upon which the doctrine rests fully and clearly stated. See, also, Woods on Fire Insurance, 473-4, 477, and notes, where numerous decisions are cited. Hall v. Railroad Company, 13 Wallace, 367; 73 N. Y. 399. The doctrine briefly stated is, where the property insured is destroyed by the negligence of a third person, so that the assured has a remedy against him therefor, the insurer, by the payment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid under the policy, and may bring an action in the name of the assured to recover the amount so paid. In such cases the assured stands in the relation of trustee to the insurer to the extent of the sum paid, and he can not even release the right of action nor the action itself, if one has been commenced, so as to defeat the claim of the insurer to reimbursement from the wrong-doer for the injury. Woods, section 476. The learned counsel for the appellant has, however, taken the ground that this doctrine does not apply where the insurer has paid the assured less than the amount due upon the policy. In such case the insurer has no right of subrogation or right of action for indemnity against the wrong-doer. In other words, if the insurer pays the assured the entire amount of the loss, he is entitled to his acton against the wrong-doer for indemnity; but if, by any arrangement or compromise with the assured, he pays less than the amount of the loss, he has no claim against the wrong-doer for reimbursement. The learned counsel has entirely misconceived the cases to which he has referred. These cases relate exclusively to controversies between creditors on the one hand and sureties on the other. They proceed upon the familiar doctrine, that where the surety has satisfied the demand of the creditor, so that the latter has no longer any claim, the surety is entitled to the benefit of all the securities of the creditor and all his rights and remedies against the principal. But, where the surety has paid part only of the debt or demand, his right of subrogation is in subordination to the paramount claim of the creditor to be satisfied his whole demand, the surety will be permitted to occupy the place of the creditor only when the latter has no longer occasion to hold the securities for his own protection. This is the principle laid down in Grubb v. Myers, 32 Gratt. 131, and is the doctrine of the cases cited by appellant's counsel. It will be perceived they have no sort of application to a case like the present, where the creditor (the insurer) has been fully satisfied and is asserting no demand against the wrong-doer. No good or even plausible reason can be suggested for the distinction made by counsel, and no authority can be found to support it. If the assured prefers to accept from the insurer a less sum than he is justly entitled to for the loss sustained, rather than embark in an expensive law suit for the recovery of the whole, the wrong-doer certainly has no just cause of complaint. It does not lie in his mouth to say that the damage arising from his misconduct deserves a higher compensation and he ought to be compelled to pay more than he is required to pay. The insurer's equitable right of subrogation is based upon what he has actually paid, and not upon that which he might or ought to have paid; and, as against the wrong-doer, he is entitled to indemnity for the part so paid, whether it be the whole or part of the demand. I do not deem it necessary to notice particularly some other cases cited by appellant's counsel. They relate to the law of maritime insurance and the rights of insurers as affected by what is known as an abandonment of the property insured. They have no sort of application to the present controversy. Applying these principles to the present case, they are conclusive of two matters: First. The right of the Watertown Fire Insurance Company to maintain this action in the name of the nominal plaintiff, Rogers, who has been indemnified for his loss. Secondly, That the release obtained from Rogers by the defendant, after the commencement of the action, is null and void and in violation of the rights of the insurance company. The circuit court, therefore, did not err in disregarding the release and the plea which offered it as a matter of defense.

The next error assigned is the admission of testimony, on the part of the plaintiff, tending to show that the defendant's locomotive, on occasions other than that for which the action is brought had emitted sparks and communicated fire to property along its track and right of way. We are of opinion that this evidence was relevant and proper for the purpose of showing negligence on

the part of the defendant's employees, or it may be defects in the construction of the engine in question.

In the case of Grand Trunk R. Co. v. Richardson, 1 Otto, 454, the Supreme Court of the United States was of opinion that evidence was properly received to show that fire had been communicated by sparks at other times and from other locomotives of the same company, in order to show a negligent habit of its officers and agents. In the case before us, the testimony is limited to one and the same locomotive, and is clearly admitted, according to all the authorities. Pierce on Railroads, 438; Sherman & Redfield on Negligence, 380.

The next error assigned is the action of the circuit court in giving instructions asked for by plaintiff's counsel. It will only be necessary to state, in substance, the several propositions of law embodied in four of these instructions: First, they assert that the defendants are liable for the loss sustained if the cord-wood of the plaintiff was burned by sparks or fire emitted from the defendant's locomotive through carelessness on the part of the defendant's employees or agents, or for want of proper machinery or spark-arresters, and the liability equally attaches if the fire in question originated on the defendant's right-of-way, and was thence communicated to and burned the wood belonging to the plaintiff. Second, the defendants are liable for the loss if they did not have the most approved and best appliances and safe-guards in the nature of ash pans and spark-arresters—such as are generally adopted by and used upon modern railroads in this country. Third, the defendants are liable if they permitted combustible matter to accumulate and remain on their track or right-of-way, so that fire from the locomotives, in passing such combustible matter, might be communicated to adjoining property, and was in fact so communicated by sparks issuing from such locomotive and thrown upon and igniting such combustible matter. These are the propositions laid down in the first four instructions of the plaintiff. That the railroad company is liable where the fire is attributable to the negligence of its agents or to the want of proper machinery and spark-arresters upon its locomotives, does not admit of controversy. In employing so powerful and dangerous an agency as steam, it is incumbent upon the company to avail itself of the best mechanical contrivances and inventions in known practical use, which are effectual in preventing the burning of private property by the escape of sparks and coals from its engines, and it is liable for injuries caused by its omission to use them. Pierce on Railroads, 433-443; Wharton on Negligence, sec. 872. With respect to the accumulations of combustible matter near the track of the road, there is some diversity of judicial opinion. In some of the cases it is held that the leaving such matter exposed to the sparks issuing from locomotives is *per se* negligence, which renders the company liable in case of loss. In others it has been held to be a matter for the jury to determine, under all the circumstances, whether such conduct is actionable negligence. We are of opinion that, like all other questions of care and diligence, it is a matter for the jury to determine, and no inflexible rule can be laid down on the subject. What may be reasonable care in one case might be gross negligence in another. Still it may be safely said for a railroad company negligently to permit the accumulation of combustible matter along its line in such a situation as readily to ignite from sparks from its locomotives, is such conduct as will make it responsible for damages sustained by fires communicated from such matter to adjacent property. Wharton on Negligence, secs. 88, 873; Pierce on Railroads, 434; 58 Ill. 390. This disposes of the first four instructions of the plaintiff.

The fifth instruction is in the following words: "The court instructs the jury that, railroad companies having conferred on them, by law, the privilege of using and employing the powerful and dangerous agency of steam, have also imposed on them the exercise of the greatest caution and prudence in their business, and any omission on the part of the railroad to exercise that high degree of caution and prudence toward the public and adjoining property holders, is negligence on the part of such railroad, and they will be held responsible for the consequences of such want of care and prudence." The difficulty, with respect to this instruction, is that it announces a rule which imposes upon railway companies the same degree of care and diligence in the conduct of their business towards the holders of adjoining property that is exacted from them as carriers of passengers. The law requires of such companies that they shall adopt such precautions as may reasonably prevent damage to such property, and it may be that, in towns and cities and populous districts, they should be held to the exercise of the highest degree of care and diligence to prevent injury to others.

But we are not prepared to say that any omission to exercise the highest degree of care and diligence, under all circumstances, constitutes negligence on the part of a railroad company. If it be conceded, however, that the language of the instruction is too broad and comprehensive, as to which no opinion need be expressed, it does not follow the judgment is on that ground to be reversed. For although an instruction may be erroneous, this court will not, for that reason, grant a new trial, if it be manifest that the excepting party could not have been prejudiced by it. This is the settled rule of this court, recognized and acted on in numerous cases. What was said by Judge Daniel in Calvin v. Menefee, 11 Gratt. 93, directly applies here. "The facts which the excepting party sets out for the purpose of exhibiting the supposed error of the court, show, at the same time, that the fate of his case, as resting on that foundation, must have been the same, though the instructions have not been given." For if it

be conceded, as claimed by the defendant, that their locomotive was of the most approved construction, and their spark-arrester was the same as used by the leading railroads of the country, the fact was nevertheless established that this same engine had on several occasions set fire, not only to buildings, but to fields and forests and combustible matter on and along their line of the road. The testimony of a dozen witnesses could not lessen the force of this evidence. With such an engine in use, it was the grossest negligence in the defendants to permit the accumulation of a large quantity of highly combustible matter along their track, especially at a point where there was a heavy grade and a consequent increase in the volume of sparks emitted. The defendants were therefore liable upon the ground of gross negligence—or want of ordinary care in the conduct of their business. And upon this ground the jury must have found a verdict for the plaintiff, even though the instruction had never been given. It is clear, therefore, that the defendant could not have been the least prejudiced by the ruling of the court in this particular.

It may be further observed that the defendant also asked for instructions, all of which were given by the court. These instructions, in connection with those of the plaintiff, had so clearly stated the principles of law applicable to the real facts of the case, it may be fairly presumed that the jury fully comprehended the entire scope and extent of these inquiries, and the duties they were to perform. All that has been said with reference to the fifth instruction, applies with equal force to the sixth, asked for by the plaintiff. It is in the following words: "If the jury believe from the evidence that the defendant used wood in their locomotive known as the 'Henry Young,' when their necessity and convenience required, and they further believe that said locomotive was built for the exclusive use of coal as a generator of steam, then the defendant was guilty of negligence, and the jury will find for the plaintiff." This language, literally construed, required the jury to find for the plaintiff if the defendants used wood as fuel in their engine whenever necessity and convenience required, although it might not have been so used at the time of the occurrence of the fire. The draftsman of the instruction meant, no doubt, to declare, that if at the time of the happening of the accident wood was used for the purpose of generating steam, such use of it in an engine constructed exclusively for burning coal, constituted negligence, for which the defendants were liable. We think that this is the construction which ought to be given to it here. The plaintiff proved that the screen or spark-arrester in the engine was constructed with reference to burning coal exclusively, and that on several occasions during the month of April the persons in charge of the locomotive had procured wood for use in the engine, and they insisted it might be fairly inferred from all the evidence, it was so used at the time of the occurrence of the fire in question. On the other hand, the defendants proved at that time coal only was used for the purpose of generating steam. It was a question for the jury to decide which of these theories was correct. It was with reference to this state of the facts the instruction was asked and given. It was no doubt so understood by the court and the counsel on both sides. It would be an insult to the understanding of the jury to suppose they did not perceive that the point they were to decide was whether wood was in fact used at the time of the happening of the accident. If they believe it was not, there was of course an end to all controversy on that branch of the case. These considerations are sufficient to show that the jury could not have been misled by the language in which the instruction was couched. We do not mean to affirm that the use of wood in a coal burning engine is *per se* negligence. It is a circumstance from which negligence may often be inferred, because, as was proved in this case, the meshes in the wire netting of a spark arrester are made much larger when coal only is used for fuel, than when made for wood, and sparks from wood are more dangerous than those from coal, because they retain fire for a much greater length of time. The consumption of wood as fuel in this particular locomotive under the circumstances disclosed by this record, was negligence and gross negligence, particularly on the day and at the place of the fire, when, as is proved, the wind was high and blustering, and where there was an accumulation of a large quantity of combustible matter, liable at any time to be ignited.

Upon the whole, we are of opinion there is no error in the ruling of the court to the prejudice of the defendants; that a case of grosser negligence could scarce be shown than is exhibited by this record; and that the judgment of the court must accordingly be affirmed. At the same time we can not refrain from saying that the practice now so prevalent of multiplying instructions, many of them involving doubtful questions of law, not only places the appellate court in a position of great difficulty with respect to verdicts that are just and proper, but frequently leads to a reversal where otherwise there would be an affirmance. We respectfully suggest that one or two instructions would often be more intelligible to the jury and more effectively attain the ends of justice.

Judgment affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. ASSIGNMENT—PENDING ACTION BY PLAINTIFF TO CO-PLAINTIFF.

A transfer by a plaintiff of his interest in the action to a co-plaintiff, during the pendency of the suit, will not justify a court in dismissing the action. *Maganaw v. Bell.* S. C. Neb,, Sept. 21, 1882; 13 N. W. Rep., 279.

2. ATTACHMENT— NON-RESIDENCE AS A GROUND—CHANGE OF DOMICILE.

One S, in May, 1881, came from Illinois to this State with the intention of abandoning his former residence and residing here, but his wife remained in Illinois until October of that year. In June 1881, an action by attachment was commenced against S and wife, upon the ground that they were non-residents. *Held*, that the attachment could not be sustained. *Swaney v. Hutchins*, S. C. Neb., Sept. 27, 1882; 13 N. W. Rep., 282.

3. COMMON CARRIERS — DISCRIMINATION IN RAILROAD FREIGHT—DAMAGES, HOW COMMUTED.

Where at a former term of the court it was decided that the receiver of a railroad company, by the adoption of a contract with a third party and settlements with him thereunder, had discriminated against the plaintiffs in the rates charged them for transportation of wheat and grain over the railroad operated by him contrary to the provisions of the State statute, and that plaintiffs were entitled by law to have their grain transported over said road at rates which would put them on an equal footing with said third party for like transportation, and it was referred to a special master to take an account of the amount of such unfavorable discrimination, and to report the result of such examination, *held*, that the amount of the fund which, under the contract, could be used to pay such third party's commissions, and all expenses incident to the business and the receiver's freights, is the difference between the prime cost of the wheat shipped and the net proceeds of sales, deducting freights and charges incurred upon other roads and after the shipment left the receiver's road; and that the amount of discrimination is the difference between such amount, after deducting therefrom expenses, compensations, rent of warehouses, interest, exchange, insurance, and the outlay at way stations made by the receiver to secure the trade, and the amount of the freight charged to such third party according to tariff rates; and that a decree be entered accordingly. *Grivsser v. McIlrath*, U. S. C. C., D. Minn., June Term, 1882; 13 Fed. Rep.. 373.

4. COMMON CARRIER—LIMITING LIABILITY BY CONTRACT.

1. It is well settled that a common carrier of persons or property can not by any agreement, however plain and explicit, wholly relieve itself from liability for injury resulting from its gross negligence or fraud. 2. It is also settled that in order to exempt the carrier from liability, or to limit the extent of its liability for injury caused by its own negligence of any kind, the contract must expressly so provide. 3. A contract providing that in case of loss the carrier shall be liable to pay, as damages, a specified sum, will not, without an express stipulation to that effect, relieve the carrier from liability to the full amount of the value of goods lost through its negligence. 4. So the words "liquor carried at val. $20 per bbl." stamped upon the face of a receipt, if they can be construed into a contract to limit the liability of the carrier to the sum of $20 in case of loss, must be so construed as to limit such liability only in case of loss without the fault of the carrier. 5. The non-delivery of goods intrusted to a carrier, and its admission that the same are lost so that it can not make delivery, are presumptive evidence of negligence on its part. *Black v. Goodrich Transp. Co.*, S. C. Wis., Sept. 9, 1882, 13 N. W. Rep., 244.

5. CONTRACT—PURCHASE WITH FRAUDULENT INTENT.

It is the making a purchase with the specific intent to take advantage of the insolvency of the purchaser, and not pay for the goods purchased, that avoids a sale and enables the seller to replevy the goods on the ground of fraud; and such specific intent must be alleged in the petition. *Houghtaling v. Hill*, S. C. Iowa, September 20, 1882, 13 N. W. Rep., 305.

6. EQUITY—MISTAKE—CONTRACT IN WRITING.

Plaintiff leased certain buildings to defendant, and it was mutually understood between them that in case the buildings were destroyed defendant should be released from further payment of rent, and at the time the written lease was executed they were advised that the terms used would have that effect, which, as a matter of law, was not the case. The buildings were destroyed by a tornado, and plaintiff sued for rent accruing after such destruction. *Held*, that the parties never intended to enter into the contract set forth in the writing; that the mistake was one of fact and not of law; and that defendant was entitled to relief in equity. Where parties, in the absence of fraud, mistake or other equitable circumstances, have made an agreement, and the writing expresses such agreement as it was understood and designed to be made, parol evidence can not be introduced for the purpose of varying the contract as expressed in the writing. But if, after making an agreement, in the process of reducing such agreement to a written form, the writing, by means of a mistake of the law, fails to express the contract which the parties actually entered into, equity will interfere to reform it, or prevent its enforcement to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. *Reed v. Root*, S. C. Iowa, September 21, 1882, 13 N. W. Rep., 323.

7. EQUITY—MONEY PAID BY MISTAKE.

Where a bank, on a certain date, was indebted to a depositor, who owed the bank on a note not yet due, and who purchased of the bank and gave his check for a draft on a distant city, which was mailed to that city to pay an indebtedness to an insurance company, but the draft was dishonered, and notice given, the bank in the meantime having become bankrupt, and, upon consulting with a layman, he was advised that the bankruptcy prevented an offset, and he paid the note to the assignee, *held*, that he was entitled to a return of the money so paid by him. *In re Farmers' & Mechanics' Bank*, U. S. D. C., N. D. N. Y., 1882; 13 Fed. Rep., 361.

8. EQUITY—RESCISSION OF CONTRACT—RESULTING INJURY TO DEFAULTING PARTY.

Equity will not decree the rescission of a contract at the suit of one party thereto, on the ground that the other has failed to fulfill his part of the engagement, if the defaulting party can not be placed *in statu quo*, and injury would result to him from the rescission. In such case parties must resort to the courts of law, and seek the damages to which they are entitled by reason of the breach of the contract. *Stringer v. Keokuk, etc. R. Co.*, S. C. Iowa, Sept. 20, 1882; 13 N. W. Rep., 308.

9. EVIDENCE — ADMISSIONS— ESTOPPEL—JUDICIAL RECORDS.
Admissions or statements, though appearing in judicial records, estop the person making them from explaining them or denying their truth only as against those who were parties or claim rights under such records, or who acted upon or were influenced by such statements. *Dahlman v. Foster*, S. C. Wis., Sept. 9, 1882; 13 N. W. Rep., 264.

10. EVIDEN CE—TRANSACTION WITH DECEASED PERSON—ASSIGNMENT.
A person who is precluded by statute from testifying against an executor, can not, by transferring his interest during the pendency of the action, be rendered competent to testify. *Maganaw v. Bell*, S. C. Neb., Sept. 22, 1882; 13 N. W. Rep , 277.

11. HUSBAND AND WIFE—PAYMENT OF HUSBAND'S INDEBTEDNESS TO WIFE.
Where a husband is honestly indebted to a wife, he has a right to pay the debt, and the wife may receive payment the same as any other creditor; and such payment may be made by a conveyance of property, no lien having attached. Crouse v. Morse, 49 Iowa, 382. *Jones v. Brandt*, S. C. Iowa, Sept. 21, 1882; 13 N. W. Rep., 310.

12. JURISDICTION—SERVICE OF PROCESS ON FOREIGN CORPORATION.
When a foreign corporation avails itself of the privileges of doing business in a State whose law authorized it to be sued there by service of process upon an agent, its assent to that mode of service is implied; and it consents to be amenable to suit by such mode of service as the laws of the State provide, when it invokes the comity of the State for the transaction of its affairs; and waives the right to object to the mode of service of process which the State laws authorize. *Merchants' Mfg Co. v. Grand Trunk R. Co.*, U. S. C. C., S. D. N. Y., August 30, 1882; 13 Fed. Rep., 358.

13. MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF A MAGISTRATE.
In an action for malicious prosecution, the defendant can not be permitted to prove that he acted under the advice of a magistrate. *Probst v. Ruff*, S. C. Pa., October 2, 1882.; 13 Pittsb. Leg. J. 67.

14. MECHANIC'S LIEN—MATERIAL FURNISHED WITHOUT OWNER'S KNOWLEDGE—NOTICE.
Defendant contracted with a carpenter to build a house. The carpenter purchased the lumber from plaintiffs on credit. Defendant did not know from whom the lumber was purchased, or that it was not paid for, until after he had paid the carpenter the contract price; but he did know the carpenter had bought the lumber of some one, and in his contract he had reserved the right to discharge mechanic's liens, if any should be claimed. Plaintiffs brought this action to foreclose their mechanic's lien. *Held*, that these facts were sufficient to put defendant upon inquiry, by which the existence of the claim might have been discovered, before settling with the carpenter, and that the lien must be enforced. *Gilchrist v. Anderson*, S. C. Iowa, Sept. 19, 1882; 13 N. W. Rep., 290.

15. NEGOTIABLE PAPER—UNCERTAINTY OF INSTRUMENT.
When an instrument is not certain, or is not capable of being made certain, as to the time of payment, the law does not regard it as negotiable paper, and in this case the following instrument was held not to be negotiable: "$300. Dallas Township, Iowa, March 18, 1880. Three months after date I promise to pay to the order of Warren Roberts $300, at the First National Bank of Burlington, Iowa, value received, with interest at 10 per cent. per annum, including attorney's fees and all costs of collection. The makers and indorsers of this obligation further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely, as he or they may see fit. [Signed] Warren Roberts. Indorsed on the back: Warren Roberts." *Woodbury v. Roberts*, S. C. Iowa, September 21, 1882, 13 N. W. Rep., 231.

16. PATENTS—REISSUES—DEFECTS CURED.
Where, upon inspection and comparison, the lack of definite specifications, which rendered prior reissues inoperative, has been cured by the present reissue, the reissue *prima facie* is good. *Schneider v. Bassett*, U. S. C. C., D. N. J., July 25, 1882. 13 Fed. Rep., 351.

17. POST-OFFICE — DETAINING LETTERS — SUIT AGAINST POSTMASTER.
In an action against a postmaster for withholding letters of the plaintiff, the defendant set up as a defense a regulation of the post-office department permitting the detention of letters whenever the postmaster has reason to believe that a designated place is being used for covering under a fictitious address correspondence forbidden circulation in the mail. *Held*, that the defendant should be required to furnish a bill of particulars, setting forth the facts and circumstances of which induced him to believe that the place was being used for covering forbidden correspondence in the mails under a fictitious address. *Wilson v. Pearson*, U. S. C. C., S. D. N. Y., Aug. 30, 1882; 14 Rep. 392.

18. STOPPAGE IN TRANSITU — SEIZURE OF GOODS UNDER PROCESS AGAINST CONSIGNEE.
1. The seizure of personal property, consigned to purchasers by virtue of process against their goods, does not destroy the vendor's right of stoppage *in transitu*. 2. The taking of the property from the carrier by the officer under the process, and not of the agent of the purchaser, does not operate as a delivery to them; and it is immaterial that they delivered to the officer, or allowed him to take the bill of goods and the vendor's letter of advice inclosing it, or that, after the seizure, he stored the goods in the purchaser's building. *Sherman v. Rugee*, S. C. Wis., Sept. 29, 1882; 13 N. W. Rep., 241.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be re-*

peated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.

QUERIES.

36. A, while sick at Indianapolis, made his will on Sunday, and lived about a year thereafter. When he made the will, and up to the time of his death, he was fully competent to make a will. There was no urgent necessity for making the will on Sunday. Is the will void because made on Sunday? Cite authorities.

C. G. B.

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37. Smith is circuit clerk; Jones owes Smith $100 on note not due. Smith has grounds to attach Jones' property in his county, and is desirous to do so. Can Smith approve his own bond, while performing the duties of circuit clerk, as a basis for the writ, under the Missouri statute, 1879? or, if he assigns the note to another, and the question is raised, how will Smith avoid sec. 3462 Rev. Stat. Mo., 1879? LEX.

Maryville, Mo.

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38. A dies, leaving a widow and children surviving him; but during his life time he purchases and causes to be conveyed to two of his sons, B and C, certain real estate. Action is begun to make partition of the estate, A setting up the fact that B and C have been fully advanced their share of their father's estate in his life time. They answer, that the conveyance was a gift, and not an advancement. The matter is in court ten years, and a large amount of property in controversy. The rents and profits of which, amounting to $10,000, have been collected and taken by the other children of A. It is finally decided that the conveyance to B and C were gifts, and that they shall share in the partition of A's estate. Query: Can B and C recover their respective shares of the rents and profits collected by the other heirs during the time the question was being litigated? Please give authorities. H.

Kokomo, Ind.

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39. A, a municipal corporation of the 3d class, under the statutes of Ohio, arrests B for the violation of an ordinance, closing billiard halls at 6 o'clock P. M. B sets up as a defense, that the ordinance is oppressive and unreasonable, and that as corporations (municipal) have no power to prohibit, either directly or indirectly in the State of Ohio, and also that the doctrine of repeal by implication is not favored, he, the defendant, should be acquitted. J. W. S.

Bellefontaine, O.

QUERIES ANSWEREE.

Query 33. [15 Cent. L. J. 288.] For the sale of real estate under the administration law of Arkansas, for payment of debts of deceased, the statute provides that the executor or administrator must apply to the Court of Probate by petition describing the lands to be sold, etc., and containing a true and just account of debts, etc., and if the court finds the personal estate insufficient to pay the debts, it shall direct the sale of such lands as are set forth in the petition, or so much thereof as will satisfy said debts. Under this statute, A, administrator, filed his petition to sell all the lands of B, deceased, for the payment of debts, and gives no other kind of description; doesn't even state where the lands ie. The court thereupon ordered the said administrator to sell all the lands of said deceased (no other description at all), and afterwards the record shows that said administrator had sold all the lands, etc., and the court doth therefore approve the sale. This is just as certain as the record is in the description of the land sought to be sold. Under it the administrator made a deed to over 400 acres, minutely described, as having been ordered by the court. Now the questions are, could such an order authorize such a sale, and would a sale under such an indefinite description, and order of record be upheld? Would such a sale convey the title? Please cite authorities. W.

Yellville, Ark.

Answer. The rule in Arkansas is,a sale of lands by an administrator, without having given the notice prescribed by statute, if confirmed by the probate court, passes title, although it is error for the probate court to confirm such sale. But this error can only be corrected on appeal, and not collaterally, for the reason that the probate courts are courts of record, invested with exclusive jurisdiction in matters of estates of deceased persons, and a proceeding to sell lands of an estate is within that jurisdiction. Montgomery v. Johnson, 31 Ark. 74, and cases cited there. In Rogers v. Wilson, 13 Ark. 507, the court held that "an order of the probate court, authorizing the administrator to sell lands without notice, as required by statute, is erroneous, but not void for want of such notice, the proceeding being *in rem*, and the court having jurisdiction of the subject matter." This case has been followed in 19 Ark. 499; 25 Ark. 52, and 31 Ark. 74. The purchaser under the deed, as stated in the query, has clearly a good title. S. & T.

Helena, Ark.

Query 23. [15 Cent. L. J. 179.] T H M procures insurance on his life, and causes policy to be made payable "to his wife, A A M, and his children." At the time the policy is issued he has two children. Subsequently he has another child. He dies, leaving his wife and three children surviving him. Has his last child any interest in the policy? What interest has his wife, A A M, in it? Does she take one-half, or an interest equal to each of such of the children as take an interest? Or does she take a life estate, and the children an interest in remainder? C. & S

Maysville, Ky.

Answer No. 2. If deceased had in his life time made a will, leaving property "to his wife, A A M, and his children," having then two children alive, and had subsequently had another child, as stated in the query, then, at his death, his wife and all his children who survived him, irrespective of the dates of their birth, would take the property in equal shares. See Wilde's Case, 6 Coke, 16 *b*; Oates v. Jackson, 2 Strange, 1172; 3 C. E. Green (N. J.) 231 *et seq.*; 6 C. E. Green, 84, 86; 9 C. E. Green, 294; 5 Dutcher (N. J.), 346; 2 Williams on Ex'rs, 937, 983; 2 Beasley (N. J.), 237. The same rule would hold good, it is supposed, in case of the insurance policy in question. It was said in De-Ronge v. Elliott, 8 C. E. Green (N. J.), 490, by way of *dictum*, that the fund of an insurance policy going to children, would go to children living at father's death. See, also, Crogin v. Crogin, 66 Me. 517; S. C., 22 American Reports, 588.

New Brunswick, N. J. EDWARD W. STRONG.